EXHIBIT 1
DATE 4-15-09
SB 30

Labor-Management Advisory Council on Workers' Compensation

Lt. Governor John Bohlinger
State Capitol
PO Box 200801
Helena, MT 59601
(406) 444-3111
jbohlinger@mt.gov

Jerry Keck (ex-officio)
Employment Relations Division
Department of Labor and Industry
1805 Prospect Avenue
Helena, MT 59601
(406) 444-1555
jkeck@mt.gov

Representing workers:

Doug Buman
Laborers' Int'l Union of N. America
12201 Tukwila Int'l Blvd
Suite 140
Seattle, WA 98168
(206) 728-1282
trifund@mail.unions-america.com

Jacquie Helt
AFL-CIO
Missoula, MT 59802
(406) 544-9682
iorganize@aol.com

Dan Lee
AFL-CIO
PO Box 16026
Missoula, MT 59808
(406) 880-3362
dannylee12337@msn.com

Don Judge
Injured Workers Resource Council
32 S. Ewing
Room 114
Helena, MT 59601
(406) 459-1708
donjudge7@hotmail.com

Jason Miller
1012 Livingston
Helena, MT 59601
(406) 461- 1857
jmhelena@gmail.com

Representing employers:

Bill Dahlgren
Operations Manager
Sun Mountain Sports
301 North 1st
Missoula, MT 59802
(406) 728-9224
bill@sunmountain.com

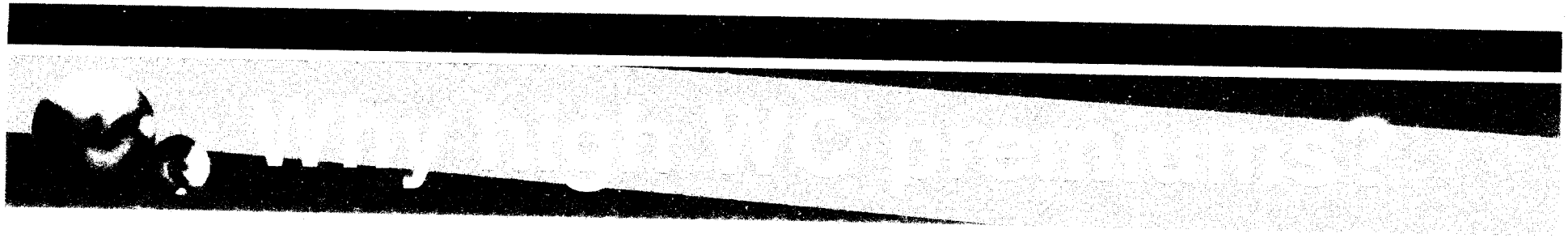
Annette Hoffman
St. Vincent's Healthcare
1230 N. 30th Street
Billings, MT 59101
(406) 237-4011
annette.hoffman@svh-mt.org

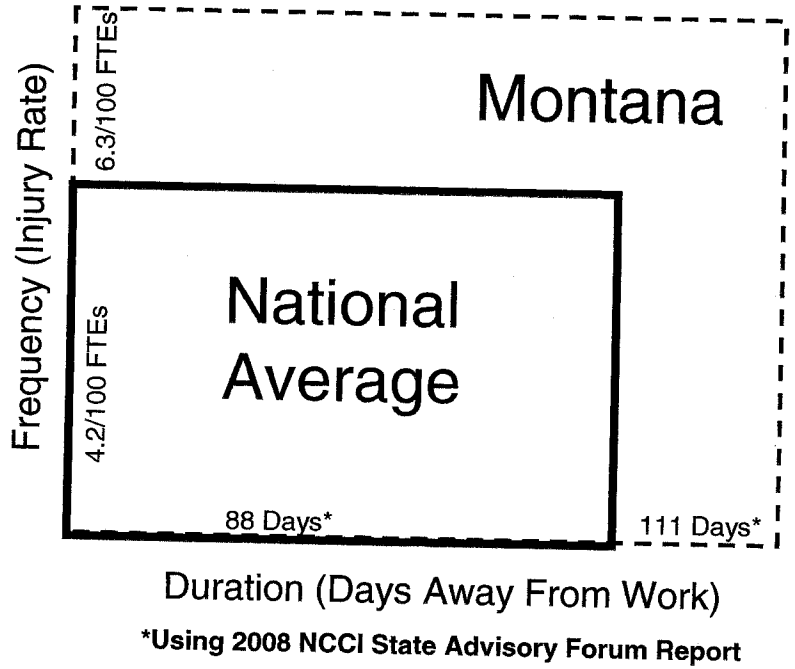
Riley Johnson
National Federation of Independent Business
7 West 6th, Power Block, Suite 4C
Helena, MT 59601
(406) 443-3797
mitsi@qwest.net

Connie Welsh
State of Montana
PO Box 200127
Helena, MT 59620-0127
(406) 444-2553
cowelsh@mt.gov

Bob Worthington
28 Cloverview
Helena, MT 59601
(406) 439-7544
rworthington1@bresnan.net

July 2008





***Using 2008 NCCI State Advisory Forum Report**

- We injure more people
- They are off work longer
- We have higher medical costs
- Must collect higher premium per $100 payroll to cover significantly more people
- Montana has a lower wage base that premium is applied to

Fact Sheet on WorkSafeMT
A Statewide Safety Education Campaign
Proposed by the Labor Management Advisory Council
On Workers' Compensation
April 15, 2009

1. Montana has the 2nd highest workers' compensation premium rates in the country.

2. The primary cost driver for our high premium rates is our high frequency of claims or injury rates (50% above national average). We have an average of 6.3 injuries per 100 employees in Montana vs. a national average of 4.2 injuries per 100 employees.

3. The Labor Management Advisory Council (LMAC) has been studying the reasons for our high workers' compensation costs for the past 2 years. The LMAC is made up of 5 representatives of management and 5 representatives of labor and is chaired by Lt. Governor Bohlinger.

4. The Council has recommended that in order to reduce our injury rate, Montana needs a comprehensive statewide safety education program. The LMAC approved creation of the WorkSafeMT Foundation as the vehicle to begin changing the safety culture in Montana.

5. The WorkSafeMT Foundation is a not for profit public/private broad-based cooperative effort to change Montana's safety and transitional employment cultures. The goal is to reduce our injury rates and our duration of time away from work to the national average which translates to a reduction in our workers' compensation premiums.

6. The National Council on Compensation Insurance (NCCI), the workers' compensation rate setting authority for Montana, estimates that if we could reduce our incidence of injuries and our duration of time away from work to the national averages, the state of Montana could save more than $150 million in workers' compensation costs. Here is a breakdown of the potential savings:

- 37.5% or **$145 million per year *if*** we reduce our injury rate to national average
- 3.3% or **$12.5 million per year *if*** we reduce days to return to work to national average

7. The LMAC has also been focusing on the skyrocketing costs of medical care in workers' compensation. We currently spend 69¢ of every $1 of workers' compensation benefits for medical expenses. Only 31¢of every dollar provides lost wage replacement for injured workers. The LMAC is analyzing ways to reduce this cost while maintaining good access to quality medical care for injured workers.

8. The LMAC will continue to look at the cost drivers in our workers' compensation system with the goal of making recommendations that maintain fair and adequate benefits to injured workers at a reasonable cost to employers.

What *Should* Be Driving Workers' Compensation Reform?

Edward M. Welch*

The editor has asked us to address the question, "What is driving workers' compensation reform?" I find this a very difficult question to answer. It is hard to see what could be driving the reform in the direction that it is headed. On the other hand, I see a number of factors that might be driving workers' compensation reform in a different direction, but they do not seem to be having any effect.

Costs are down

Most of the "reform" that continues to take place today involves changes to workers' compensation laws that are designed to reduce costs to employers by lowering benefits to workers. When this process began in the late 1980s and early 1990s it was clear that it was being driven by rapidly-rising employer costs. That cannot be the driving factor today, however, because costs are not going up; they are going down. In fact they are substantially below the highs of the early 1990s.

*Edward M. Welch, Director, Workers' Compensation Center, Michigan State University, East Lansing, MI. E-mail: welche@msu.edu

FIGURE 1
Costs per $100 of Wages

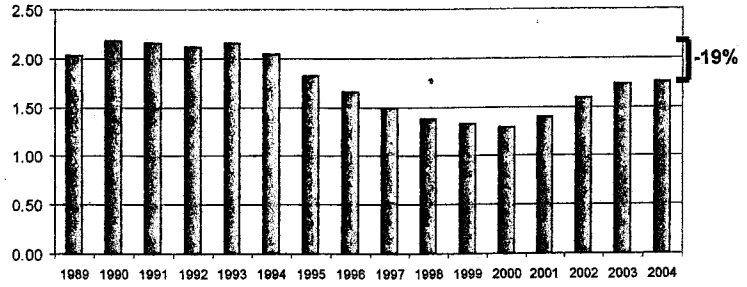


Figure 1 is based on data published by the National Academy of Social Insurance.[1] It shows workers' compensation costs per hundred dollars of wages. For 2004, the latest year for which data are available, employer costs were 19 percent below the high of 1993.

FIGURE 2
Benefits per $100 of Wages

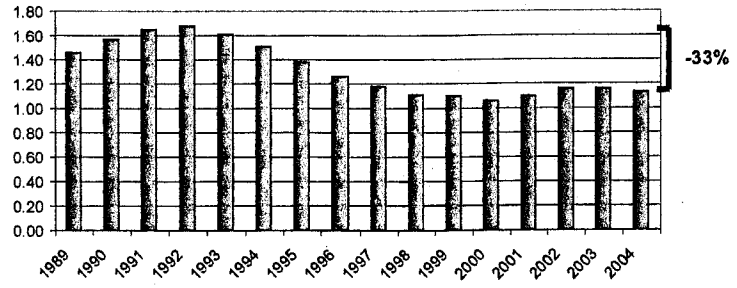


Figure 2 is also based on data collected by NASI. This shows benefits to workers per hundred dollars of wages. Benefits are down 33 percent from their high in 1992.

[1] See http://www.nasi.org

FIGURE 3
WC as Percent of Wages

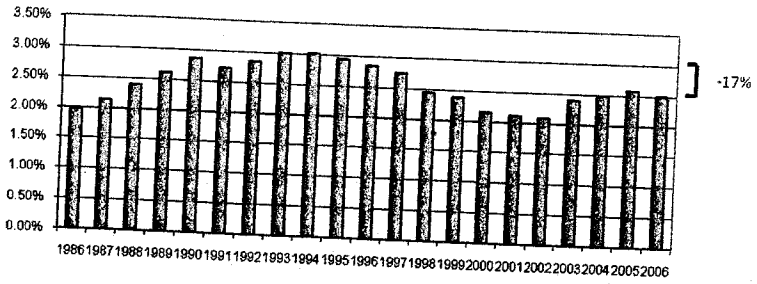


Figure 3 contains data published by the U.S. Bureau of Labor Statistics[2] based on a survey of employers. It also shows workers' compensation costs as a percentage of wages. By this measure costs are down 17 percent from their high in 1994 and headed lower.

I am not aware of any published data that contradict these findings. Costs are down across the country and in nearly every state. Increasing costs is not a logical explanation for the current wave of reforms.

Interstate comparisons

It is argued by employers in some states that there should be reform because the costs in those states are high relative to other jurisdictions.[3] This may be an explanation for a reform movement in a few individual states but it cannot explain a national trend to reduce benefits and lower costs. Half of the states will always be below the median. If a state's position relative to other jurisdictions were the main force behind the reform movement, we should expect to see an effort to raise benefits in half of the states and an effort to reduce costs in the other half. Instead we have seen a nationwide movement to reduce costs.

[2] See http://www.bls.gov/ncs/ect/

[3] The Workers' Compensation Center at Michigan State University publishes on its Web site a summary of some of the studies showing interstate comparisons. See http://www.lir.msu.edu/wcc

Moreover, even in states that have relatively high costs, the costs today are lower than they were in the early 1990s.

Employers can control their own costs

It is sometimes argued that although costs are down they are, nevertheless, higher than they should be. This should not be a reason to narrow eligibility or reduce benefits for workers. Employers have it within their own power to control their workers' compensation costs.

In the early 1980s, research sponsored by the Michigan workers' compensation bureau demonstrated just how much control employers have.[4] The researchers looked at 5,000 employers in 29 different industries, all within Michigan. They found that the differences among employers (Figure 4) within the same industry, within the same state, were bigger than the differences among states (Figure 5).

[4] See R.V. Habeck, M.J. Leahy, H.A. Hunt, E.M. Welch, and F. Chan, "Employer Factors Related to Workers' Compensation Claims and Disability Management," *Rehabilitation Counseling Bulletin*, March 1991, pp. 210-242.

FIGURE 4

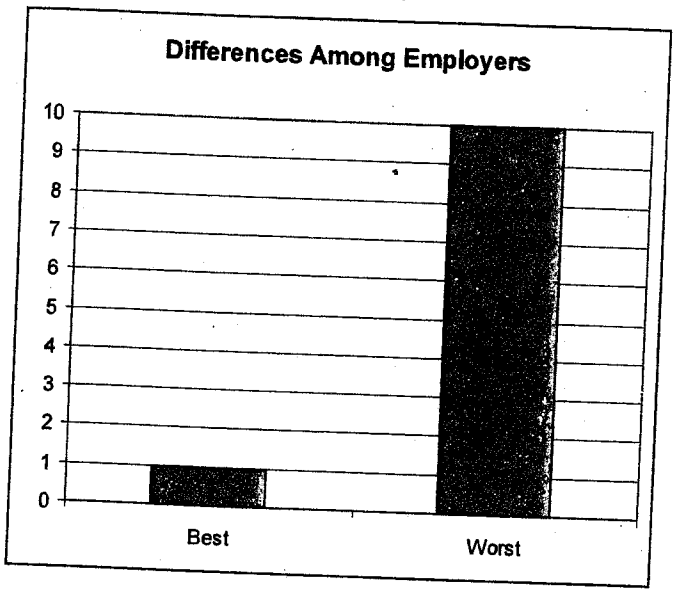
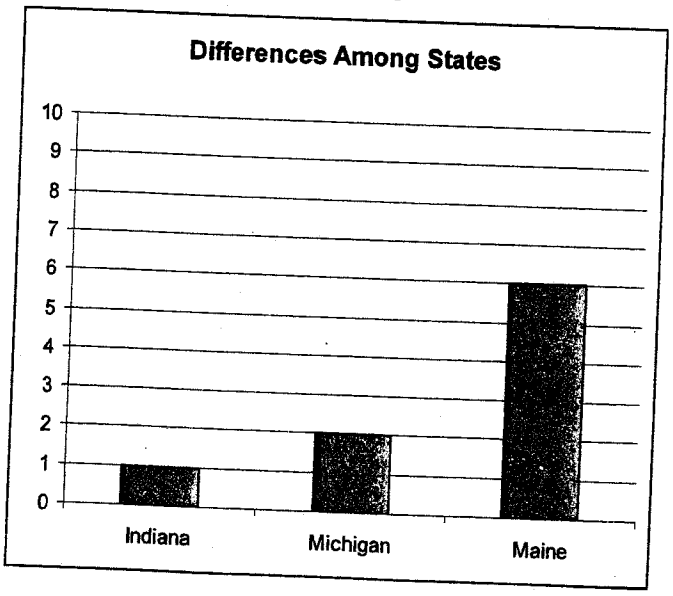


FIGURE 5



At that time, the difference between Michigan and Indiana was two to one. Michigan's costs were twice the costs in Indiana. The differences between Indiana and Maine, at that time the lowest and highest cost states, were six to one. The costs in Maine were six times the costs in Indiana. But the differences among employers within the same industry, within the same state, were 10 to one. The worst employers had 10 times as many claims as the best.

The researchers went back and conducted a survey to determine what accounted for the differences among employers. In four industries they looked at the employers with the most claims and the employers with the fewest clients. They found that three factors stood out: 1) safety, 2) disability management, and 3) the corporate culture. Based on my experience since then, I would add to this list good claims management.

At the Workers' Compensation Center at Michigan State University[5] we conduct seminars for workers' compensation professionals. Time after time we see people who show us how they have reduced their company's cost of workers' compensation by dramatic amounts. Usually this includes aggressive programs for safety and prevention and early return to work. These companies are also seeking out and providing to their claimants the highest quality medical care available. They quickly and fully pay deserving claims but are not afraid to challenge and litigate claims that should be denied.

If costs are too high, employers should be controlling this within their own organization. It is clear that they have the power to do that.

What should be driving reform?

If the movement to reform workers' compensation by reducing benefits to workers cannot be justified in terms of high or increasing costs, what is behind it? I simply do not know the answer to this. I would suggest, however,

[5] See the WCC Web site at http://www.lir.msu.edu/wcc/

that there are other things going on that are not, but should be, driving a reform of workers' compensation laws.

Lack of dignity in the system

The first problem I see is the extent to which workers must forfeit their dignity in order to claim the rights to which they are entitled under workers' compensation laws. During the early 1990s there were many anti-fraud campaigns. These included a great deal of publicity about how bad people were who claimed workers' compensation benefits. In many cities there were billboards with pictures of a man behind bars advertising an 800 number to which the public was invited to report workers' compensation fraud.

Of course these campaigns were designed to deter fraud. If a person was sitting at home thinking of filing a fraudulent workers' compensation claim, we wanted to discourage him or her from doing that. These campaigns, however, had a broader effect. We all know that there are many disabilities about which there can be an honest difference of opinion concerning whether they are compensable. Undoubtedly these billboards also discouraged workers from filing claims in those cases. Was that part of the intent? Who knows?

Every claimant's attorney that I know frequently experiences the following situation: A worker comes into the office to initiate a workers' compensation claim. He or she begins by immediately telling the attorney, "I want you to understand that I am not like all those other workers' compensation claimants. I really did get hurt." How have we come to a situation in which an ordinary worker must stop and apologize to his or her own attorney when asserting a right that is guaranteed by law?

Workers today are embarrassed to apply for benefits. Workers should be able to claim their rightful benefits without being humiliated.

Benefit adequacy

There is a widespread assumption that workers' compensation benefits are generous. They are not. Following the great catastrophe that this nation experienced on 9/11, we appointed a commission to compensate the victims. After very careful consideration, the commission came up with a scheme for doing so. Under that scheme, as under workers' compensation, recipients give up a right to file civil law suits, and instead received an amount that was determined by certain calculations.

For 9/11, the average award for a death claim was $2 million. The average award for an injury claim was $384,000 dollars.[6] It is hard to calculate the "average" award across state workers' compensation systems, but these figures are in the neighborhood of ten times the average award given to workers who are injured on the job.

Why were those deaths and injuries worth ten times as much as the deaths and injuries that occur on jobsites every day? Was that a unique situation? Yes. Were they over compensated? They do not feel that they were. Are ordinary work-related deaths and injuries drastically under compensated?

The National Academy of Social Insurance has recently completed a study analyzing the adequacy of workers' compensation benefits.[7] It found them lacking in many ways. Most seriously injured workers suffer a large lifelong wage loss that is not replaced by workers' compensation benefits. Workers' compensation should replace 80 percent of the after-tax wage loss for work-related injuries.

Defusing myths

There is a widespread belief that injured workers can live well on the benefits they receive. There is a widely accepted assumption that workers re-

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[6] See K. Fienberg, *What is life worth?*, BBS Public Affairs, New York, 2005, p. 202.

[7] See H.A. Hunt, *Adequacy of Earnings Replacement in Workers' Compensation Programs*, 2004, Kalamazoo, MI: W.E. Upjohn Institute for Employment Research.

turn to work at well-paying jobs immediately after receiving large workers' compensation settlements. Admittedly, these things happen from time to time, but there is no evidence that this is normal or frequent. It is quite likely that a large number of workers are required to borrow from friends and face repossession of their cars, furniture, and homes while living on workers' compensation benefits.

The NASI study discussed above cited a method for wage-loss studies that can document what really happens to workers. We should stop making decisions based on stories and myths and conduct the research that is necessary to find out what really happens to people. The widespread belief that workers live well off of workers' compensation is not based on fact. States should conduct the research necessary to determine what happens to workers who suffer an on-the-job injury.

Cost of living allowances

Virtually every other system for compensating individuals includes adjustments for increases in the cost of living. Most workers' compensation systems do not. For the vast majority of injuries, this is not important because they are of short duration. In a few cases where workers are truly disabled from a long-lasting injury, the results of this can be devastating. Their benefits stay at the same level, while the cost of living and the wages of uninjured workers increase.

The purchasing power of workers' compensation benefits erodes as time goes by. Workers' compensation benefits should be indexed for increases in the wages.

Fraud

The publicity campaigns of the 1980s and 1990s emphasized fraudulent claims by workers. Most insurers, however, will admit that more dollars are involved in employer fraud than in worker fraud. This fraud involves employers who misrepresent payroll; either by not reporting their entire payroll, reporting their payroll in the wrong classifications, or classifying

individuals as "independent contractors" when they are really employees. Recent developments have also revealed that the cost of workers' compensation has been increased because brokers and insurance companies present fraudulently inflated bids to employers.

Employer fraud adds substantially to the cost of workers' compensation. There should be aggressive procedures for identifying and prosecuting fraud by employers, insurers, and agents. These should include civil and criminal penalties.

Starving out workers

In many states, the workers' compensation system allows employers to withhold benefits while a worker hires an attorney and waits for the system to hold a formal hearing. While this is happening, the insurance company or employer earns interest on the money that should be paid to the worker, and the worker has no income. For a while, the workers are able to borrow money from friends, but this is quickly exhausted. They begin to miss mortgage and car payments, and frequently lose their possessions and sometimes their homes.

Many states allow employers to withhold benefits from workers while disputes are resolved. Workers' compensation systems should not allow employers and insurers to starve out workers while they await an adjudication of their rights.

A new set of reforms?

I have listed here are just a few of the problems that confront injured workers today. It seems to me that they could very well justify an entirely new set of reforms to the workers' compensation system. Realistically, however, I don't see much happening on the political horizon.

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Robert Aurbach, Editor

IAIABC
International Association of Industrial
Accident Boards and Commissions

From the DEW Line...

Who Are We (Should We Be) Listening to Concerning Reform?

Editor's Report

Three leading observers of the U.S. workers' compensation system independently addressed the question, "What's pushing reform?" for this issue. They come from different points of view, and present significantly different perspectives, but all agree on a common conclusion: the current wave of reform is difficult to justify on objective evidence about the overall economic health of workers' compensation in the United States. Insurance rates are historically fairly low, despite increasing severity, and insurers are generally experiencing very favorable overall operating ratios.[1]

Nonetheless, reform is happening, in response to some perceived need. It might be useful to stop and look at the interests of the players affecting policy in workers' compensation and consider who has been calling the tune, and to whom we really ought to be listening.

The reforms of this decade seem to be primarily focused on the cutting of costs in the system to employers. There are four ways to accomplish that end: 1) reduce the frequency of accidents (safety initiatives), 2) re-

[1] The 2005 overall operating ratio reported in the September/October 2006 issue of *Workers' Compensation Policy Review* was 90.6, meaning that profits were $9.40 for every $100 of payroll.

duce the severity of accidents (disability management and return to work initiatives), 3) reduce the payments made to service providers and others benefiting from servicing the system (medical cost containment, litigation reduction, etc.), and 4) reduction of benefits (either directly, or through tightening of eligibility requirements, apportionment, or dismantlement of 2d injury funds).[2] Naturally, different advocacy groups seize constituent friendly methods. It can be informative to see which advocacy groups focus on which potential cost savers

Who are we listening to?

The insurance industry has been a major player in reform in some states, on its own behalf, and/or as a proxy for the employers who are its policyholders. How well the two groups' interests are aligned remains to be seen. Theoretically, the insurance industry ought not to care about benefits, or the profits of service providers, so long as the insurance market is free enough to allow for insurers to charge a premium that is actuarially sufficient to pay for overhead, the benefits that will become due, and a reasonable profit. This lack of an objective interest in the content of the law is offset by at least two concerns: 1) Lack of predictability makes actuarial predictions unsure, so changes in the law that make for less certainty of prediction are considered undesirable - and changes that make for more objectivity and predictability are considered beneficial, and 2) Hand-in-hand with predictability is the notion that the administrative cost of claims administration, including the need for well-trained and sophisticated adjusting staff, is controllable to the extent that adjusting practices can be objectified.

Benefit algorithms, fee schedules, mandatory guidelines and the like, can be substituted for adjuster discretion if the statute is narrowly drawn. Resulting reductions in the need for trained adjusters, automation of adjusting processes, or increases in the claims handling capacity of exist-

[2] For a discussion of the later point, see John Burton's contribution to the reform discussion, in this issue.

ing adjusting staff can make a carrier more profitable with no increase in premium. Interestingly, many of the reforms advocated by the insurance industry over the last decade have sought to increase predictability and objectivity with respect to benefits and provider service payments, but have not focused on return to work or accident avoidance measures. Both of these strategies are very intensive users of skilled labor – just what the insurer wants to avoid.[3]

Lawyers always seem to be at the table whenever reform is discussed, ostensibly on behalf of their clients. On their own, lawyers are just employers or employees and ought to have the same interests as other employers and employees. Yet, it is interesting to note how the reform proposals[4] that provide for the objective determination of benefits have not made it into law, often because of opposition from this group. This group also seldom actively advocates for worker safety and return to work programs, notwithstanding the substantial literature documenting that workers are better off not getting injured, or returning to work as soon as they may safely do so, once injured. This might be puzzling, if one believes that the lawyers are advocating for injured workers, because it is difficult to say that an injured worker's best interests are being served by blocking, or at least not supporting, reforms that would keep workers from being injured, return them to productive life more quickly, or pay the *majority* of workers the benefits they are due faster and with lower costs associated with litigation. Still, their position is understandable if you look to their own interests – there's a wise saying that avers: "If you have only a hammer in your tool box, every problem looks like it needs a nail."

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[3] The Conning Research and Consulting report, "Study Cautions Carriers about Climbing Severity," reported in an article in Workcompcentral.com on July 25, 2007, warns that increased focus on injury prevention is necessary to keep the industry profitable over the long course.

[4] California is a notable exception, and the California Applicant's Attorney Association continues to push for rollbacks on the objective criteria instituted by HB 899.

It is tempting to look at the well-documented correlation between lawyer involvement and increased indemnity and medical benefit expenditures[5] and conclude that, notwithstanding who the lawyers say they are representing, the fee arrangements of private attorneys representing workers offer a powerful incentive to maintain the opportunity to seek ever-higher utilization of medical benefits and payments of indemnity benefits. To be sure, the legal community has often argued that the (sometimes staggering) differential between indemnity payments and medical benefits paid to represented workers versus unrepresented workers[6] is due to differences in the severity and complexity of the cases that they see. Interestingly, the differential seems markedly diminished (at least in the Maine study reported in these pages) when a public advocate, with no-profit motive, represents the worker. Thus, there is some reason to question whether that group is any less conflicted in its interests than the insurance industry. Still, a definitive answer on conflict of interest must await a thorough and well-conceived study of the indirect costs of attorney involvement.

Even if the legal community's involvement were not tainted by self-interest, the advocacy tactics utilized by that group cause us to focus on the wrong issues. A legislator presented with a horror story concerning the fate of a single worker may or may not have the time to check the accuracy of the advocate's description of the circumstances, and may or may not have the presence of mind to ask whether the story represents an isolated instance or a documented systemic problem. Isolated instances are rarely a valid measure of overall systemic fairness. Even the fairest of social systems cannot manage to treat the vast array of human behavior and circumstances correctly in every instance, and that is particularly so in a system

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[5] See, for instance, "Health Experience of Workers Receiving Lump-Sum Payments from the Maine Workers' Compensation System During the Period 2000-2004," in this issue, for some interesting comparisons between the results obtained between unrepresented workers, privately represented workers, and workers represented by public advocates.

[6] An examination of rating bureau information for Delaware indicated that in the subject years, represented expenditures for injured workers were 11 times higher in medical payments and 30 times higher in indemnity benefits than for unrepresented workers.

that balances the rights and obligations of multiple parties. Adjusting the system to deal with every individual case of failure is a bad way to make policy. Even the lawyers have a saying that applies to this kind of anecdote spinning: "Hard cases make bad law."

Lastly, we tend to listen to the medical providers, although they have lately been treated with some mistrust due to perceptions about their perceived role in increased medical severity in workers' compensation. Many medical providers are genuine, unabashed advocates for "cost shifting" from areas of practice where they are required to provide care at a loss or at diminished profit to workers' compensation. They threaten that if they are not able to charge what they feel is appropriate, they will choose not to accept workers' compensation cases. Some argue against efforts to base treatment on evidence- based guidelines and against utilization of an objective fee schedule based on something other than their own billing behavior, such as the RBRVS system developed by Medicare. Injured workers are too often used as the unwitting test subjects for new technologies such as implantable surgical hardware, and off-label use of prescription drugs. And an increasing number of doctors are recognizing the tendency in their profession toward "disease mongering" and inability to withstand patient pressures for drugs and treatments that will "fix" the problem.[7]

The medical profession (and the researchers that are gathering evidence concerning the efficacy of treatments) remains the principle source of information on the proper treatment of specific illness and injury, and a growing number of health care providers are speaking out, motivated by the highest ideals of service and quality of care. Those professionals have taken a stand for the objective improvement of the quality of care provided to injured workers,[8] and have worked tirelessly to provide policymakers the tools to take control of the perceived problems. Still, even amongst the best of them, the focus is sometimes too narrow to fully inform the public policy debates. While some specialties are primarily concerned about re-

[7] See, "A Candid Discussion Amongst Doctors," *IAIABC Journal*, 44(1).

[8] See, for instance, T. Nuchols, "The Value of High Quality Medical Care in Workers' Compensation," *IAIABC Journal*, 44(1).

turn to work and industrial hygiene, many health care professionals that involve themselves in policy debate ignore these important issues.

Who aren't we listening to?

Injured workers and employers are the primary recipients of the benefits of the original *quid pro quo* that underlies workers' compensation conceptually. Yet, both are too busy, most of the time, to personally show up and express educated opinions when policy is debated, if they are even aware of the changes being proposed. To be sure, business associations and organized labor are available and sometimes active participants. Yet, each has deficits as a representative. In an era of declining union influence in most of the country, labor officials often rely upon the attorneys who represent them or the medical providers who treat them, out of (sometimes misplaced) trust, or fear of having an ineffective voice. Most business groups tend to be dominated by their larger members, whose concerns may or may not be the same on issues such as return to work, mandatory safety initiatives, provider networks, and other issues where enterprise size may have a differential impact. Smaller businesses often don't have expertise in workers' compensation and regard the whole business as a burdensome cost of doing business and hope that their insurance company will keep them on the right side of the law.

\Fortunately, there is an alternative emerging to advocacy solely by proxy.[9] Increasingly, states are looking to the workers and employers themselves for objective evidence of their experience with the system. While the results of these surveys do not tell us what reforms workers and employers want, they give far better information than what was previously available concerning how they experience the system's actual functioning. From that starting place, better questions about policy reform can be asked.

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[9] See, for instance, "Health Experience of Workers Receiving Lump-Sum Payments from the Maine Workers' Compensation System During the Period 2000-2004," in this issue.

We also don't listen very much to our researchers. The jargon and methodological "hair splitting" of many scholars makes their work unapproachable to policymakers. Moreover, data availability seems to always make the research too removed from current events or the specific circumstances of the problem at hand and can frustrate policymakers by presenting limitations and delays in getting answers. For example, knowing what the total medical cost per claim was two years ago does not tell you about recent inflation and certainly does not tell you about the specific cost drivers that are operative in the current market.

But the real problem is one of communications: evidence-based policy formulation requires a specific sequence of events. Someone must formulate a question which, when answered, will make a difference in the policy debate. The researcher must find and analyze pertinent data and report the results. Someone must interpret the data in the context of the question asked, turning the data into usable information. Finally, the information must be used as part of the basis of the decision, rather than being quietly ignored when it doesn't fit out preconceptions. The first, third, and fourth steps of the process are often lost in the perceived exigency of the policy debate, so that well-intentioned research is misdirected or misused, or just plain ignored.

One definition of insanity is doing the same thing over and over and expecting a different result. If we continue to listen to the same voices when we consider systemic change, we should not be surprised if the reforms that we achieve advance the goals of the speakers more than those of the system as a whole. The authors of the articles in the symposium that leads this issue of the *Journal* collectively argue that we are not listening well enough. And at least one has raised the possibility that if we do not start listening better, we may lose control of our system at the very time when changes in the environment are already challenging the basic assumptions of a separate system for treatment of industrial accidents.

